

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CLYDE TERRY, an individual,
and ANNE TERRY, an individual,

Plaintiffs,

NO. CIV. S 04-2314 MCE CGH

v.

MEMORANDUM AND ORDER

THE TRAVELERS INDEMNITY
COMPANY OF CONNECTICUT, a
Corporation; and KENNEL PAK, a
Corporation; and GENTZLER &
SMITH ASSOCIATES, a
Corporation,

Defendants.

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Plaintiffs Clyde and Anne Terry have petitioned this Court
to reconsider its April 27, 2005, Memorandum and Order wherein
the Court struck their claim for attorney's fees accrued in an
underlying state court action (the "Order"). Concurrently with
that motion, Plaintiffs filed a petition to certify two questions
of law for immediate appellate review. The Court will dispose of
both Plaintiffs' motions herein ("Motions").

In their motion for reconsideration, Plaintiffs allege that a California Supreme Court decision distinguished and limited the authority relied upon by this Court in issuing its earlier Order. That supreme court decision, Plaintiffs contend, was not properly considered by this Court thereby requiring the that the earlier Order be revisited.

In their motion for certification of questions of law, Plaintiffs contend that sufficient grounds exist to certify the following two questions: 1) Whether emotional distress damages are available in negligence and negligent representation actions; and 2) Whether a showing of exceptional circumstances is required when seeking an award of attorney's fees under the "tort of another" doctrine. As explained fully below, Plaintiffs' motion for reconsideration is denied. Likewise, Plaintiffs' petition for certification of the foregoing questions of law is denied.¹

BACKGROUND

The Court has already set forth a detailed factual background for this action in its Order of April 27, 2005, which is incorporated by reference and need not be reproduced herein. (Mem. & Order 2-5). Subsequent to that Order, Plaintiffs filed a First Amended Complaint reasserting their four original claims against Defendants as well as emotional distress damages and attorney's fees in all claims. Defendants moved for a second

¹Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

1 time to strike all references to 1) emotional distress damages in
2 the negligence and negligent misrepresentation claims and 2)
3 attorney's fees in all claims. The Court again agreed with
4 Defendants and, in a Memorandum and Order dated August 15, 2005,
5 granted the motion to strike, this time, without leave to amend.
6 Plaintiffs have filed the present Motions in response.

7

8 **STANDARDS**

9

10 **Motion to Reconsider**

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12 A court should be loathe to revisit its own decisions
13 unless extraordinary circumstances show that its prior decision
14 was wrong. Christianson v. Colt Indus. Operating Corp., 486 U.S.
15 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988). This
16 principle is generally embodied in the law of the case doctrine.
17 That doctrine counsels against reopening questions once resolved
18 in ongoing litigation. Pyramid Lake Paiute Tribe of Indians v.
19 Hodel, 882 F.2d 364, 369 (9th Cir. 1989) (citing 18 C. Wright, A.
20 Miller & E. Cooper, Federal Practice and Procedure § 4478 at
21 788-89). Nonetheless, a court order resolving fewer than all of
22 the claims among all of the parties is "subject to revision at
23 any time before the entry of judgment adjudicating all the claims
24 and the rights and liabilities of all the parties." Fed. R. Civ.
25 P. 54(b).² Where reconsideration of a non-final order is sought,

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27 ²Plaintiffs did not clarify under which rule they were
28 seeking reconsideration. However, in seeking reconsideration,
(continued...)

1 the court has "inherent jurisdiction to modify, alter or revoke
2 it." United States v. Martin, 226 F.3d 1042, 1048-1049 (9th Cir.
3 2000). The major grounds that justify reconsideration involve an
4 intervening change of controlling law, the availability of new
5 evidence, or the need to correct a clear error or prevent
6 manifest injustice. Pyramid, 882 F.2d at 369.

7 In addition, pursuant to E.D. Local Rule 78-230(k), an
8 application for reconsideration must set forth, by affidavit or
9 brief, any new material facts and circumstances that support a
10 claim that the Court's previous ruling be revisited.

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12 **Motion to Certify Questions of Law**

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14 The decision to certify an order for interlocutory appeal is
15 committed to the sound discretion of the district court. Swint
16 v. Chambers County Comm'n, 514 U.S. 35, 47, 131 L. Ed. 2d 60, 115
17 S. Ct. 1203 (1995). In order to qualify for certification under
18 28 U.S.C. § 1292(b), a district court judge must be convinced
19 that the order involves a controlling question of law as to which
20 there is a substantial ground for difference of opinion, and that
21 an immediate appeal from the order may materially advance the
22 ultimate termination of the litigation. The party requesting
23 certification has the burden of showing that "exceptional

24

25 ²(...continued)

26 Plaintiffs cannot rely on Fed. R. Civ. P. 59(e) or 60(b) because
27 they only apply to reconsideration of "final judgments and
28 appealable interlocutory orders." Balla v. Idaho State Bd. of
Corrections, 869 F.2d 461, 466-67 (9th Cir. 1989). Accordingly,
the Court will consider this a Rule 54(b) motion.

1 circumstances" justify a departure from the basic policy of
2 postponing appellate review until after the entry of a final
3 judgment. In re Cement Antitrust Litig., 673 F.2d 1020, 1026
4 (9th Cir. 1982) (internal citations and quotations omitted).

5

6 **ANALYSIS**

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8 **1. Motion for Reconsideration**

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10 Plaintiffs are seeking reconsideration of this Court's
11 Order, dated April 27, 2005, striking their claim for attorney's
12 fees accrued in the underlying Terry v. Levens suit. As
13 explained above, in order for Plaintiffs to be successful on
14 their motion, they must establish that the Order involves an
15 intervening change of controlling law, the availability of new
16 evidence, or the need to correct a clear error or prevent
17 manifest injustice. 28 U.S.C. § 1292(b).

18 Plaintiffs do not allege the existence of new evidence nor
19 do they allege manifest injustice or that this Court committed a
20 clear error. Rather, they contend that intervening legal
21 authority compels a different result than that previously reached
22 by this Court. Specifically, Plaintiffs contend that Gray v. Don
23 Miller & Associates, Inc., 35 Cal. 3d 498 (Cal. Sup. Ct. 1984),
24 erodes the ground upon which this Court rendered its earlier
25 decision. As explained in detail below, Plaintiffs contention
26 that the Gray case is intervening legal authority compelling a
27 different result is entirely without merit.

28 As an initial matter, it is disingenuous at best to argue

1 that the Gray case, decided fully 20 years prior to the present
2 action, is new legal authority. Nor can the Gray case be
3 considered an intervening change of controlling law as it is
4 neither a change in the controlling law nor intervening. Even to
5 the extent the Court yields to Plaintiffs' argument, the Gray
6 case does not compel a different result.

7 Plaintiffs' central argument is that the standard for "tort
8 of another" damages first articulated in Prentice v. N. Am. Title
9 Guar. Corp., 59 Cal. 2d 618, 620 (1963), and used by this Court
10 in issuing its Order, was substantially altered by the Gray case
11 rendering the original Order baseless. Specifically, Plaintiffs
12 contend that this Court struck their claim for attorney's fees
13 based on Plaintiffs failure to show "exceptional circumstances"³
14 as required under the "tort of another" doctrine of Prentice.
15 However, Plaintiffs urge, that holding is now baseless because,
16 under Gray, the "exceptional circumstances" requirement was
17 expressly eradicated.

18 While Plaintiffs are correct that Gray arguably narrowed the
19 "exceptional circumstances" requirement of Prentice, Plaintiffs
20 are mistaken in assuming this Court based its holding solely on
21 the lack of exceptional circumstances. A plain reading of the
22 Order quickly reveals that the Court pointed to the lack of
23 causation between Defendants' conduct and the underlying third
24 party suit as grounds for striking Plaintiffs claim for fees.

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26 ³The Prentice court proclaimed that "In the absence of some
27 special agreement, statutory provision, or *exceptional*
28 *circumstances*, attorney's fees are to be paid by the party
employing the attorney." Prentice, 59 Cal. 2d at 620(emphasis
added).

1 Under both Prentice and Gray, it is unquestionable that, absent
2 causation, a party may not recover attorney's fees for the tort
3 of another irrespective of exceptional circumstances. In fact,
4 the Gray court specifically held that "...the rule of
5 Prentice..., has been applied when it has been found that the
6 party seeking attorney fees was *required by the wrong of the*
7 *defendant to protect his interests by bringing or defending an*
8 *action against a third person.*" Gray, 35 Cal. 3d at 508.

9 In two prior orders, this Court expressly found that
10 Plaintiffs did not establish the requisite "natural or proximate"
11 connection between Defendants' conduct and the underlying third
12 party action. (Mem. & Order at 10, April 27, 2005; Mem. & Order
13 at 6, August 15, 2005). Consequently, any narrowing of the
14 exceptional circumstances doctrine arguably dictated by Gray does
15 nothing to remedy Plaintiffs' failure to establish causation and,
16 therefore, does nothing to compel a different result here.

17 Because Plaintiffs have utterly failed to establish an
18 intervening change of controlling law, the availability of new
19 evidence, or the need to correct a clear error or prevent
20 manifest injustice, the Court denies their motion for
21 reconsideration.

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1 **2. Motion to Certify Questions of Law**

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3 **a. Emotional Distress Damages**

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5 A discretionary interlocutory appeal must establish the
6 existence of a controlling question of law as to which there is a
7 substantial ground for difference of opinion, and that an
8 immediate appeal may materially advance the ultimate termination
9 of the litigation.

10 Plaintiffs first seek certification on the issue of whether
11 emotional distress damages are available in negligence and
12 negligent representation actions. It is very well settled in
13 California that recovery for the inevitable distress resulting
14 from finding oneself the victim of a negligent tortfeasor is not
15 recognized unless malice, breach of certain limited fiduciary
16 duties, physical injury or impact, or some other unusually
17 extreme or outrageous circumstance can be shown. Friedman, 107
18 Cal. App. 4th at 484 (citing Branch v. Homefed Bank, 6
19 Cal.App.4th 793, 801). In fact, absent impact or physical
20 injury, emotional distress damages have only been allowed where
21 the negligence is of a type which will cause highly unusual as
22 well as predictable emotional distress. Friedman, 107 Cal. App.
23 4th at 464.

24 Plaintiffs essentially reargue that Defendants owed
25 Plaintiffs a fiduciary duty as insurers and that Defendants'
26 revocation of the insurance contract was a breach of that special
27 duty. Plaintiffs then reason that the breach of an insurers'
28 fiduciary duty is excepted from the bar against emotional

1 distress damages in negligence and negligent misrepresentation
2 cases. Plaintiffs' argument in this regard is based on some
3 limited authority permitting such damages for breach of the
4 covenant of good faith and fair dealing in insurance contract
5 breach actions.⁴ In addition, Plaintiffs urge that the
6 underlying insurance contract has, as its object, the Plaintiffs'
7 emotional condition further entitling them to emotional distress
8 damages. See generally id.

9 Even assuming that Plaintiffs could show that Defendants
10 were in a special relationship with Defendants vis-a-vis the
11 existence of the insurance contract and that Defendants breached
12 a fiduciary duty to Plaintiffs as insurers, Plaintiffs' claim
13 must nonetheless fail because they cannot show that the
14 alleged negligence is of a type which would cause "highly unusual
15 as well as predictable emotional distress." Id. at 464. To be
16 sure, this case is nothing akin to a mortuary mishandling human
17 remains or a doctor telling a patient to advise her husband that
18 she has syphilis. See id. at 485. Just as in Friedman, nothing
19 in this case suggests defendants should have foreseen Plaintiffs'
20 sensitive emotional response. In addition, this Court has
21 clearly held that the Plaintiffs' emotional condition is not the
22 object of the insurance contract underlying this action further
23 eroding Plaintiffs' untenable argument. (Mem. & Order 4-5,
24 August 15, 2005).

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26 _____
27 ⁴The Court stresses that no California case has permitted
28 the recovery of emotional distress damages for negligent
revocation of an insurance contract. Rather, the clear line of
authority permits such damages only in breach of the covenant of
good faith and fair dealing inherent in an insurance contract.

1 Because Plaintiffs have failed to raise a question of law,
2 let alone a controlling question of law, their request for
3 certification of the foregoing question must be denied.

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5 **b. Attorney's Fees**

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7 Plaintiffs also request that the Court certify whether a
8 showing of exceptional circumstances is required when seeking an
9 award of attorney's fees under the tort of another doctrine.
10 Plaintiffs' argument in this respect is identical to its argument
11 set forth in Section 1 seeking reconsideration. Specifically,
12 Plaintiffs aver that exceptional circumstances need not be shown
13 when seeking attorney's fees under the tort of another doctrine.
14 Although the Gray decision arguably narrows the exceptional
15 circumstances requirement, Plaintiffs' motion for certification
16 must nonetheless be denied.

17 Plaintiffs cannot prevail on this motion because they cannot
18 show that seeking appellate review of this question will advance
19 the ultimate termination of this litigation. In fact, resolving
20 the foregoing question is quite irrelevant to this litigation
21 because the Court has not based its denial of Plaintiffs' request
22 for attorney's fees on whether Plaintiffs satisfactorily showed
23 any exceptional circumstances. Rather, the Court's holding is
24 based on the fact that Plaintiffs cannot show that there is a
25 causal nexus between Defendants' conduct and the underlying state
26 court action. Consequently, Plaintiffs' motion is denied.

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CONCLUSION

This Court declines to revisit its earlier decision to strike Plaintiffs' request for attorney's fees because Plaintiffs have failed to show an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. In fact, Plaintiffs' motion to reconsider merely reiterates the precise arguments that have been twice rejected by this Court. The Court has unambiguously articulated its position and grows weary of restating what it has already said. Plaintiffs' counsel has presented no facts or circumstances that would give rise to a proper motion for reconsideration. Accordingly, that motion is DENIED.

Similarly, with respect to Plaintiffs' motion to certify questions of law, Plaintiffs have failed to show any exceptional circumstances that would justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment. Further, Plaintiffs have presented no questions of controlling law that would advance the termination of this litigation, but instead, simply ask this Court to reexamine facts it has previously decided. Consequently, Plaintiffs' motion to certify questions of law is DENIED.

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1 Plaintiff's counsel is cautioned that continuing to file
2 motions on issues which have previously been disposed of by this
3 Court may result in further action being taken by the Court,
4 which may include sanctions.

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6 IT IS SO ORDERED.
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8 DATED: November 4, 2005
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11 MORRISON C. ENGLAND, JR.
12 UNITED STATES DISTRICT JUDGE
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